many Commenters suggest that U.S. collection rates, which directly benefit U.S. customers, are a more appropriate focus for the Commission.[53]

B. The Settlement Rate Level Is Not the Only Factor Contributing to the U.S. Net Settlements Outpayment.

The Commission cites the large U.S. net settlements outpayment as support for its unilateral imposition of lower settlement rates. However, it fails to show that its proposed actions will succeed in lowering the settlements deficit. In reality, the outpayment results from imbalanced traffic flows, which are influenced by a number of factors, not just the level of settlement rates.[54] As GTE noted in its comments, "if traffic between the two countries is equal, the net settlement payment is zero" regardless of the settlement rate.[55]

Several developments within the telecommunications industry alter traffic flows and increase the U.S. outpayment. The most notable are call-back, re-origination and re-filing practices.[56] Even AT&T has identified call-back as contributing to the traffic flow imbalance

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[53] E.g., Hong Kong Telecom at 19 ("The appropriate focus of regulatory attention, as stated by the FCC, is the international collection rates actually charged by U.S. carriers to U.S. consumers."); British Embassy at 1 ("We therefore believe that regulators should concentrate on measures which lead to the reduction of the collection rate, i.e. the tariff actually charged to consumers.").

[54] See KDD at 8 ("The principal reason for the increase in the U.S. net settlements imbalance is the steady growth in the imbalance between U.S.-billed and foreign billed traffic"); Argentina Telintar at 4 ("The most significant cause of the settlements deficit is the fact that the United States. . .made far more calls to other countries than they received from those countries.").

[55] GTE at 5.

[56] KDD at 8; Argentina Telintar at 3; C&W at 21-23; Telecom Italia at 5-6; Deutsche Telekom at 2; Portugal Telecom at 4; France Telecom at 6-7; British Embassy at 3-4.

and the U.S. net settlement outpayment.[57] Ironically, all of these pro-competitive methods bypassing the traditional accounting rate system have been accepted by the FCC.[58]

In addition to these industry-specific factors, the traffic imbalance is exacerbated by a number of socio-economic factors, including wealth, social habits, trade relationships of countries, industrialization and the expansion of multinational corporations.[59] The U.S. has a significant population of corporate and private citizens, including many immigrants, whose income levels permit them to make a large number of calls to other countries, far more than residents of those countries.[60] "No reduction in accounting rates is likely to alter this reality."[61]

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[57] AT&T at 8, n.11 ("Much more recently, the imbalance has been further stimulated by the advent of switched services provided over international private lines and, as the NPRM ¶ 12 observes by call-back, which allows foreign customers to originate U.S. out-bound calls in order to take advantage of lower U.S. prices.").

[58] See Argentina Telintar at 4-5 ("[P]olicies adopted by the FCC – particularly the encouragement of call-back and re-origination – have significantly exacerbated the international traffic imbalance....The Notice utterly fails to acknowledge that these adverse consequences are the direct result of FCC efforts to promote call-back."); C&W at 22; Deutsche Telekom at 2; France Telecom at 6; Telecom Italia at 5-6; Hong Kong Telecom at 15-16. As noted above, see note 44, call-back's contribution to the net outpayment is outweighed by its positive contribution to the net balance of payments and overall profitability of U.S. carriers.

[59] Portugal Telecom at 4; C&W at 20-22; Comments of Commission on Telecommunications of Central America ("COMTELCA") at 9; Comments of Lattelekom SIA ("Lattelekom") at 3; Telecom Italia at 5-6.

[60] Argentina Telintar at 4; Portugal Telecom at 4; France Telecom at 7; Comments of China, Directorate General of Telecommunications, Taiwan at 2.

[61] Argentina Telintar at 4.

GTE is not alone in its request that the Commission consider these other factors in addition to settlement rate levels when determining what action, if any, is necessary to benefit U.S. customers.[62] In fact, GTE's position is supported by a number of foreign carriers which are net settlement outpayers similar to AT&T, MCI Telecommunications Corp. ("MCI") and Sprint.[63] These carriers from other countries recognize that any settlement deficit is a result of the complex interaction of many factors other than settlement rates and cannot be "regulated" to a certain level. They also support bilateral negotiation of lower settlement rates and continued development of competitive principles through established multilateral fora, not unilateral action.

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[62] C&W at 21 (" The settlement deficit itself represents only one facet of the complex equation which produces the U.S. balance of trade in communications. As such, considered in isolation, it can be misleading...In the specific case of an assessment of U.S. outpayment deficits, it is necessary to consider international traffic patterns, currency exchange rates, international trade patterns, relative disposable income, the structural features of economics, culture, tourists activities, immigration and ethnic composition, and teledensity.").

[63] See KDD at 1; Comments of Telia AB at 2-3 ("Like the U.S., Sweden has high volumes of outgoing international traffic and a considerable net settlements deficit."); Deutsche Telekom at 2 ("As a payer of very substantial net settlement payments year after year, DT is acutely aware that the current above-cost accounting rates and high international traffic impose excessive costs and distort international traffic flows."); International Digital Communications ("IDC") at 1 ("Although, as a net outpayer of international settlements, IDC is fundamentally supportive of the overall reduction of settlement rates around the world, we feel that the proposed FCC benchmarks are not the appropriate method to initiate this action."); Comments of Videsh Sanchar Nigam Limited at 5 ("Many countries, such as India, are net outpayers of settlement payments to other countries. This does not mean that India can engage in such unilateral action.").

V. THE BENCHMARK METHODOLOGY AND COST DATA DO NOT SUPPORT THE COMMISSION'S PROPOSED PRESCRIPTION OF SETTLEMENT RATES.

In addition to jurisdictional and legal shortcomings, the specific methodology proposed by the Commission is fatally flawed on economic and substantive grounds. GTE submits that several methodological flaws in the NPRM require the Commission to reevaluate its proposed prescription of international settlement rates.[64] These include: (1) the inadequacy of the Commission's proposed classification of countries; (2) the Commission's lack of cost data; and (3) the inappropriateness of basing settlement rates on Total Service Long Run Incremental Cost ("TSLRIC") or Tariffed Components Price ("TCP").

The comments establish that the Commission's proposed classification of countries does not properly differentiate among underdeveloped countries. Instead of tailoring settlement rates and transition periods to levels of economic development, the Commission arbitrarily merged both upper and lower middle income countries into one group without regard to their significantly disparate income levels. As the Republic of the Philippines noted, "the attempt to oversimplify, by merging the two middle groups, results in a wide disparity in the per capita income between the lower end of the first group of $726, compared to the high end of the second group of $8,995."[65] Many of the countries in the lower half of this group are

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[64] See, e.g., Pacific Bell at 5-6; Sprint at 10-15; C&W at 10-11; Chunghwa Telecom at 2; Deutsche Telekom at 6-7, France Telecom at 10-12; Hong Kong Telecom at 26-28; KDD at 12-13; The RPOA of the Republic of Korea ("Korea") at 3-4; Comments of Singapore Telecommunications Limited ("Singapore Telecommunications") at 8-9; Comments of Jabatan Telekom Malaysia at 2.

[65] Comments of Republic of the Philippines ("Philippines") at 34.

underdeveloped and thus, would be more appropriately categorized in a broader low income group. Many of these countries lack infrastructure and have less income per capita than the upper-middle income countries to spend on telecommunications services. As such, they need more time than other countries in the Commission's middle income group to rebalance tariffs and build out their networks.

Basing categories solely on income omits consideration of the needs of developing countries in lowering settlement rates[66] and denies sufficient consideration of the factors contributing to foreign termination costs.[67] As Telefonos de Mexico succinctly stated, "the Commission's benchmark proposal is flawed from the outset because it ignores the fundamental fact that foreign carriers' costs of terminating international calls vary substantially country to country."[68]

Additionally, GTE agrees with those Commenters who believe that the Commission lacks the necessary data to evaluate the foreign costs of terminating a call.[69] Even the Commission recognizes that it "does not have, and cannot obtain the data necessary to

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[66] See C&W at 11; Sprint at 15-16.

[67] See C&W at 10-11 ("The division of countries into three categories inadequately takes into account numerous factors that must be considered in pricing telecommunications service in each country."); France Telecom at 14 (recognizing that the use of GNP is inadequate because it does not reflect other important considerations such as purchasing power parity or the level of a country's telecommunications development).

[68] Telefonos de Mexico at 20-21.

[69] See, e.g., KDD at 12; Telefonos de Mexico at 23; Comments of MCI Telecommunications Corp. ("MCI") at 2-3.

calculate such costs for each foreign carrier."[70] Lacking accurate data, the Commission improperly bases its benchmarks on data supplied by AT&T. It is clear that the cost data of a single U.S. carrier is not a proper measure of the costs of other countries' operators and cannot fairly be substituted for the actual cost data.[71] Moreover, AT&T, operating in the world's largest competitive market, can hardly be compared to the situation of any other country's operators since it "is the party with the greatest vested interest in this proceeding, and has every incentive to underestimate these costs."[72] Since every country and carrier will face different costs, AT&T is a particularly poor proxy for the costs faced by operators in developing countries. In sum, the "FCC cannot lawfully impose settlement rate benchmarks on a global basis when it admittedly lacks the data necessary to implement its own chosen methodology."[73]

GTE also supports those Commenters opposing reliance on either TSLRIC or TCP for evaluating a foreign carrier's cost of terminating an international call. Even if the Commission had the cost data necessary to perform a TSLRIC analysis -- which it does not -- TSLRIC, as applied by the Commission, is an inappropriate cost methodology because it fails to allow

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[70] NPRM ¶ 33.

[71] See, e.g., Deutsche Telekom at 10 ("It is inappropriate for the Commission to rely on information supplied by AT&T to estimate the lower end of the benchmarking."); France Telecom at 12.

[72] Hong Kong Telecom at 28.

[73] KDD at 14; NPRM ¶ 33; see also, Sprint at 15 (noting that the AT&T study on which the Commission bases its findings has never been part of the public record nor subjected to critical review and comment and observing that the Commission's failure to base its benchmarks on publicly available data opens the benchmarks to legal challenge).

carriers to recover all joint and common costs.[74] The Commission's TSLRIC approach effectively requires the sum of the prices for piece-parts of a service to be less than or equal to the price of the bundled service.[75] TSLRIC is entirely unsuited to setting rates; its only accepted use from an economic standpoint is as a test for a cross-subsidy. The use of TSLRIC to prescribe settlement rates prevents carriers, by definition, from recovering those costs which are not adequately accounted for in the pricing of network elements. For example, telephone companies, like all firms, have joint and common costs that must be recovered on a going-forward basis in order to remain in business. These costs are not reflected in the pricing of network elements; thus, TSLRIC would not produce sufficient revenue to recover all relevant costs. As a result, it is not recognized and accepted globally and, therefore, should not serve as a basis for the Commission's prescription of settlement rates.[76]

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[74] Hong Kong Telecom at 27.

[75] GTE has stated that "TSLRIC identifies the forward looking costs for an entire service offering. TSLRIC is the cost added (or avoided) by offering (or discontinuing) the total service or group of services, holding constant the production of all other services offered by the company. TSLRIC can be thought of conceptually as the difference in the service provider's total costs with and without the service. For a single service, TSLRIC consists of volume-sensitive and volume-insensitive costs." GTE at Attachment 2 "Definition of Costing and Pricing Terms" in CC Docket No. 96-98 (May 16, 1996) Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

[76] Hong Kong Telecom at 26-27; KDD at 12-13; Comments of Telecom Vanuatu Ltd. at 12-13.

Similarly, the use of TCP is inherently flawed because it does not reflect actual cost[77] or the need to rebalance the domestic tariffs of foreign countries.[78] TCP also does not reflect domestic universal service policies[79] or currency fluctuations.[80] KDD sums up the prevailing view, stating that "[w]hile the TCP approach may be the only substitute approach for which some global data are available, this does not make the TCP approach an accurate, reliable or conservative proxy for estimating 'cost-oriented' rates "[81]

VI. THE COMMISSION SHOULD NOT PRESCRIBE SETTLEMENT RATES TO PREVENT HYPOTHETICAL ANTI-COMPETITIVE BEHAVIOR.

The Commission's proposed use of benchmarks to address hypothetical anti-competitive behavior is unnecessary because such behavior is unlikely and has not been demonstrated to threaten U.S. consumers. The NPRM does not establish the existence of or potential harm from the anti-competitive behaviors the Commission appears concerned about. In fact, the relationship between above-cost accounting rates and anti-competitive behavior is "attenuated, unsupported and speculative."[82]

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77 See Lattelekom at 3; Singapore Telecommunications at 9; CANTO at 6; Chunghwa Telecom at 2.

78 Pacific Bell at 5-6.

79 Korea at 3.

80 Comments of Telecommunications Services of Trinidad and Tobago, Ltd. at 5.

81 KDD at 14; see also Sprint at 15 (questioning the sufficiency of TCP data as a basis for prescribing settlement rates).

82 KDD at 17; see also Hong Kong Telecom at 17; GTE at 24-25.

At a minimum, the Commission should recognize that "the question of whether the existence of high settlement rates provides an incentive to cross-subsidize a U.S. affiliate perhaps needs some precision."[83] Even if such an incentive exists, a cross-subsidy is not necessarily an anti-competitive act, especially if its purpose is the establishment of a new non-dominant entrant into a competitive market.[84] The Commission should avoid applying benchmarks to prevent hypothetically anti-competitive behavior because such action may block these new entrants and deter competition.[85]

Although the Commission should develop appropriate, WTO-compatible safeguards against demonstrated abuses of dominant position or other recognized antitrust violations, it should not adopt (or justify) the NPRM as an additional tool against merely hypothetical anti-competitive issues.

VII. THE RECORD CLEARLY ESTABLISHES THE NEED FOR LONGER TRANSITION PERIODS FOR DEVELOPING COUNTRIES.

As discussed above, no legal or factual basis exists for the Commission's proposed prescription of settlement rates. Nevertheless, if the Commission continues down this path, the record clearly establishes developing countries' need for transition periods longer than those proposed in the NPRM. For developing countries, reducing settlement rates involves significant tariff rebalancing and carefully planned implementation. Customers in those

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[83] British Embassy at 4.

[84] Id.

[85] Embassy of Japan at 2 (noting that the use of benchmarks as a competitive safeguard will act as a barrier to entry to the U.S. market); Comments of Telecom New Zealand at 8-9; Telefonos de Mexico at 24-25.

countries often have low incomes and need more time to adjust to paying the higher domestic prices associated with rebalancing. A reasonable time frame for developing countries to achieve cost-based settlement rates will be between five and eight years, not the two-to-four years proposed by the Commission.[86] Indeed, low-income countries require large percentage reductions in settlement rates and, thus, need the longer transition periods to rebalance tariffs without seriously jeopardizing the scope and quality of telecommunications services offered

In addition to establishing longer transition periods for developing countries, the Commission should waive or lengthen transition periods for carriers and countries reforming the telecommunications market to open competition. Nearly seventy countries have demonstrated such commitment to competition by joining the GBT. In establishing transition periods, the Commission should consider the date by which a WTO country has committed to open its basic telecommunications markets to foreign investors. In many instances, the GBT commitment date may be an appropriate beginning point for any transition period.

The complex nature of any liberalization process also dictates longer transition periods for developing countries. The United States' liberalization process has been under way for more than 15 years; the United Kingdom has required a similar period. In light of the U.S. and European experiences, the Commission should recognize the difficulties faced during liberalization and provide longer transition periods for developing countries. Admittedly, some U.S. carriers offered their general support for the transition periods proposed in the

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[86] Some Commenters advocate even longer transition periods. See COMTELCA at 15 (suggesting a transition range of seven to ten years).

NPRM.[87] Although prompted by concern that foreign countries may use longer transition periods to procrastinate,[88] such comments generally fail to acknowledge the difficulties faced by countries undertaking liberalization.

The complexity of liberalization also reinforces many Commenters' requests for country-by-country consideration of transition periods [89] Only a country-specific analysis would permit the Commission to evaluate all the factors affecting progress toward competition-based settlement rates. Such factors center around the ability of developing countries to balance a myriad of political, economic, social and financial concerns while implementing their liberalization commitments. For example, in countries with low teledensity, a portion of telecommunications revenues must be allocated to achieve infrastructure development, global service and other public policy goals.[90]

The comments are replete with concern that short transition periods will disrupt carefully balanced liberalization plans.[91] The Philippines, a country with an established pro-

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[87] See MCI at 6; Comments of Worldcom, Inc. at 10; Sprint at 17; AT&T at 18.

[88] See Sprint at 17; but see Poland at 1-2 (willing to start negotiations on settlement rates according to ITU procedures prior to its WTO liberalization commitment of January 1, 2003)

[89] See, e.g., France Telecom at 13 (advocating longer transitions periods where reasonably necessary); CANTO at 6 (recommending that transition plans be tailored on a country-by country basis in light of rate rebalancing and other plans); Portugal Telecom at 9 (requesting the Commission to forbear from imposing its benchmark rates where competition is being introduced).

[90] Comments of Solomon Islands at 2; Comments of Hispanic-American Association of Research Centers and Telecommunications Companies at 5.

[91] As noted, the Commission's proposal may disrupt privatization plans upon which investments were made in contemplation of a given time frame for transition to a competitive market. GTE at 21.

competitive telecommunications environment, argues for a deferral of the NPRM's proposed two-year transition period so that it can further "expand its teledensity to the desired level and improve its network infrastructure."[92] Without a deferral, the country's plans to make service more widely accessible will be disrupted. The Commission's prescription of settlement rates would undermine the Philippines' public policy to use international funding to support network infrastructure.

Panama, another country committed to creating a competitive telecommunications market, states that "drastic reductions in the settlement rate would sabotage the efforts of countries attempting to establish a competitive environment and have serious deleterious effects on network development."[93] As an example, Poland is unable to liberalize its telecommunications industry before January 1, 2003, its commitment date to the WTO.[94] Its inability to do so is caused by its substantial investment effort and preparation for full liberalization, which would be harmed by the Commission's proposal.

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[92] Philippines at 5.

[93] Panama at 24-25; see also Portugal Telecom at 9. There is also great concern regarding the detrimental effects on U.S. exports of telecommunications equipment which would occur if the Commission's proposal impairs developing countries' plans for infrastructure development. See Chairman of the Industry Sector Advisory Committee on Electronics & Instrumentation for Trade Policy Matters (ISAC-5), letter to Amb. Charlene Barshefsky, U.S. Trade Representative (March 11, 1997) urging greater flexibility regarding developing countries to recognize the "complex interplay of forces that bear on the accounting rate process, without jeopardizing critical network development plans and possibly U.S. exports."

[94] See Poland at 1. As noted, however, Poland is quite willing to begin negotiations for lower settlement rates prior to its planned liberalization.

Failure to allow developing countries sufficient control over the privatization of their domestic industries will increase resentment toward the United States and could thwart the progress toward open communications markets achieved by the GBT. Accordingly, if the Commission continues its proposed prescription of settlement rates, GTE urges it to heed the preponderant view of the Commenters and increase transition periods overall, or establish them on a country-by-country basis, with particular attention devoted to the obstacles faced and commitments made by developing countries in liberalizing their telecommunications markets.

VIII. CONCLUSION

GTE respectfully submits that the WTO agreement and overwhelming opposition to the Commission's asserted authority to prescribe settlement rates require the Commission to seek alternative means of achieving its goal of lower international rates. More appropriately, the agency should assume a leadership role in promoting competition through international organs such as the WTO and ITU, rather than preemptive, unilateral action.

Specifically, the NPRM's approach should be revised to feature non-binding benchmarks and more reasonable transition periods. This would be consistent with the Commission's domestic jurisdiction, U.S. obligations under the ITU Treaties and other countries' commitments under the GBT. It would, therefore, be less likely to provoke retaliation by the international community and more likely to enhance cooperation with U.S. leadership in the appropriate multilateral fora.

The transition periods also should be flexible and permit recognition of the particular situation in each country, not only its commitments under the GBT, but its specific plans for

liberalization, infrastructure development and rebalancing of tariffs. The length of a transition period could be tailored to particular needs of developing countries. A similar approach could be used for countries that did not sign the GBT, yet have committed to liberalization. This would be consistent with the Commission's position in the NPRM that countries embarking on the road to competition should be given special consideration.

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